[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-6257

BILLY JENKINS,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

On Appeal from the Supreme Court of Georgia

BRIEF FOR APPELLANT

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-557

BILLY JENKINS,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

On Appeal from the Supreme Court of Georgia

BRIEF FOR APPELLANT

OPINIONS BELOW

The three opinions filed in the Supreme Court of Georgia (a majority opinion and two dissenting opinions) are reported as *Jenkins* v. *State*, 230 Ga. 726, 199 S.E.2d 183 (July 2, 1973). They are reprinted in the Joint Appendix, pages 52-68.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on July 2, 1973. Notice of appeal to this Court was filed on September 20, 1973. The Jurisdictional Statement was filed on September 27, 1973. Probable jurisdiction was noted on December 10, 1973. The jurisdiction of this Court rests upon 28 U.S.C. §1257(2).

STATUTES INVOLVED

Georgia Code Ann.

§26-2105 Plays, night club acts, motion pictures, television productions or other exhibitions

(a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production of other mechanical reproduction containing such conduct shall be guilty of a misdemeanor.

[Georgia Laws 1971 Session, pp. 344, 345, effective April 1, 1971]

§26-2011 Public Indecency

A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(a) An act of sexual intercourse;

(b) A lewd exposure of the sexual organs;

(c) A lewd appearance in a state of partial or complete nudity;

(d) A lewd caress or indecent fondling of the body of another person.

[Georgia Laws 1968 Session, pp. 1249, 1301; effective July 1, 1969]

Georgia Code Ann.

§26-2101 Distributing Obscene Materials

***

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

***

[Georgia Laws 1968 Session, pp. 1249, 1302; effective July 1, 1969]

QUESTIONS PRESENTED

I. Whether the film "Carnal Knowledge" is obscene.

II. Whether Georgia Code Ann. §26-2105 is unconstitutional on its face, as applied, and as construed by the Supreme Court of Georgia.

III. Whether it is constitutionally permissible to employ "local," as distinguished from statewide, contemporary community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material.

IV. Whether Appellant was denied due process of law in the proceedings below, including those in the Supreme Court of Georgia.

STATEMENT

A. Statutory Background

Because of the disparate Georgia laws which were involved in the proceedings below, it is important to outline briefly the statutory scheme surrounding the instant appeal.

In 1968, the Georgia Legislature enacted Georgia Laws 1968, pp. 1249, 1302, which became effective on July 1, 1969 (Georgia Code Ann. §26-2101.) This provision prohibits the distribution of obscene material. §26-2101(b) defines obscenity in terms substantially identical to the plurality *Memoirs* formulation.[1] §26-2101(c) provides that non-obscene material may be

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[1] *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966) (plurality opinion).

Cases of various types involving §26-2101(b) have been before this Court several times. *Gable* v. *Jenkins*, judgment affirmed, 397 U.S. 592 (1970) (per curiam); *Johnnie Reb's Book & Card Shop* v. *Slaton*, affirmed, 401 U.S. 985 (1971); *Gornto* v. *Georgia*, cert. denied, 402 U.S. 933 (1971); *Evans Theatre Corporation* v. *Slaton*, cert. denied, 404 U.S. 950 (1971); *Walter* v. *Slaton*, cert. denied, 404 U.S. 1003 (1971); *Paris Adult Theatre I* v. *Slaton*, vacated and remanded, 413 U.S. 49 (1973).

obscene if it is exploited for the sake of appealing to the prurient interest, or if it is possessed by any person with the intent to so exploit it.

Also in 1968, the Georgia Legislature enacted Georgia Laws 1968, pp. 1249, 1301, which became effective on July 1, 1969 (Georgia Code Ann. §26-2011). This provision enumerates certain acts which are punishable as "public indecency" if performed "in a public place." §26-2011 is a statute of the type commonly referred to as "indecent exposure" laws.

In 1971, the Georgia Legislature enacted Georgia Laws 1971, pp. 344, 345, which became effective on April 1, 1971 (Georgia Code Ann. §26-2105). This provision flatly prohibits the performance in motion pictures and other forms of expression of acts which would constitute "public indecency" under §26-2011. §26-2105 neither contains nor implies the concept of obscenity, nor does it in any way refer to the obscenity law described above.

For the sake of clarity, these provisions are sometimes referred to in this Brief as §26-2101(b) (obscenity), §26-2101(c) ("pandering" or intent to pander), and §26-2105 (exhibition of a film portraying acts which would constitute "public indecency").

B. The Instant Case

"Carnal Knowledge" is a motion picture which was acclaimed critically as one of the "10 Best" films of the year 1971 (JA 24, 59).[2] Actress Ann-Margret

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[2] "JA" stands for the Joint Appendix filed simultaneously with this Brief in accordance with Rule 36 of the Rules of this Court.

received an Academy Award nomination for her performance (JA 24). The film enjoyed popular acceptance throughout the nation, including many cities and towns within the State of Georgia (JA 24, 59).

Appellant, Billy Jenkins, manager and president of the Broad Avenue Cinema in Albany, Georgia, was exhibiting "Carnal Knowledge" on January 13, 1972, when an investigator in the Dougherty County Sheriff's Office seized the film pursuant to a search warrant he had executed after consultation with the District Attorney (JA 16).[3]

Jenkins was subsequently arrested pursuant to a warrant which charged him with violating Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency") (JA 5-6).[4]

Jenkins was formally accused on March 6, 1972 (JA 7-8).[5] The accusation employed the general chap-

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[3]The seizure of the film and its continued detention throughout the proceedings below clearly violated both First and Fourth Amendment standards. *Heller* v. *New York*, 413 U.S. 483 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973). However, Appellant did not object to the introduction of the film as evidence and, accordingly, the seizure issue is not before this Court on this appeal.

[4]Although the arrest warrant was dated February 10, 1972 (JA 5), it was not docketed in the Dougherty County Superior Court until March 6, 1972 (JA 3).

[5]The accusation also named a co-defendant, Whitfield Woodall, but the case was subsequently nol prossed as to him (JA 3).

ter heading for Georgia Code Ann. Ch. 26-21 ("distributing obscene material"),[6] but specified the charge against Jenkins *only* with selected language from Georgia Code Ann. §§26-2105 and 26-2011, stating that he did:

> knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person [JA 8].

On March 20, 1972, Jenkins demurred to the accusation (JA 9). Among the six grounds of the demurrer were challenges to the constitutionality of Georgia Code Ann. §26-2105 on its face and as applied to him (JA 9-11). On the same day, the trial judge overruled each and every ground of the demurrer without comment (JA 13).

Jenkins was tried in the Dougherty County Superior Court on March 22 and 23, 1972. The prosecutor

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[6]Although it bears the general heading "Distributing Obscene Materials," Ch. 26-21 comprises separate and distinct provisions dealing with obscenity and pandering (§26-2101); the unsolicited mailing of explicit sexual material (§26-2102); use of premises so as to constitute a public nuisance (§26-2103); obscenity and advertising therefor declared to be contraband (§26-2104); portraying acts which would constitute "public indecency" (§26-2105); and a severability provision (§26-2106).

Georgia Code Ann. §26-2011 ("public indecency"), which is incorporated into §26-2105, appears in Georgia Code Ann. Ch. 26-20 ("Sexual Offenses").

introduced as evidence only the film "Carnal Knowledge," which was viewed by the jury, and then rested (R. 5, 22).[7] Jenkins introduced testimony about another film showing in Albany, as well as copies of explicit sexual books and magazines then available for purchase in Albany (R. 5, 23-46).

The trial judge's instructions to the jury noted that the State's contentions lay in the accusation (JA 26), which charged only a violation of Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency"). Nevertheless, the instructions encompassed, along with §26-2105, the separate and distinct offenses defined by §26-2101(b) (obscenity)[8] and §26-2101(c) ("pandering" or intent to pander) (JA 30-31).

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[7]As certified by the Clerk of the Supreme Court of Georgia on August 14, 1973, the Record below includes five separate documents, numbered as follows: (1) Opinion of the Supreme Court of Georgia; (2) Remittitur of the Supreme Court of Georgia; (3) Enumeration of Errors filed in the Supreme Court of Georgia; (4) Trial Court Clerk's Record; and (5) Trial Court Reporter's Transcript. Accordingly, as employed herein, a record reference such as "R. 5, 22" refers to the Record in the Supreme Court of Georgia, Document No. 5, page 22.

A copy of the Record in the Supreme Court of Georgia, which also includes a print of the film "Carnal Knowledge" and the books and magazines introduced by Jenkins at the trial, is on file with the Clerk of this Court.

[8]In connection with §26-2101(b), the jury was instructed to apply "community standards" to measure the obscenity of the film (JA 30). It is apparent from the Record that "local" community standards were thus involved, *not* statewide or national standards. See Appellant's Enumeration of Errors in the Supreme Court of Georgia (JA 48); Brief of Appellant in the Supreme Court of Georgia, page 10; Brief of Appellee

On March 23, 1972, the jury returned a general verdict of guilty (JA 38). Jenkins was fined $750.00 and sentenced to 12 months' probation (JA 40-41).

Jenkins appealed the judgment to the Supreme Court of Georgia, arguing that §26-2105 was unconstitutional on its face and as applied to him; that he was denied due process of law; that "local" community standards could not constitutionally be employed; and that the film "Carnal Knowledge" is not obscene in any case (Appellant's Enumeration of Errors in the Supreme Court of Georgia, JA 46-51).

On June 21, 1973, this Court announced its decisions in *Miller v. California*, 413 U.S. 15 (1973), and companion cases. On July 2, 1973, without hearing oral argument, the Supreme Court of Georgia affirmed the conviction of Billy Jenkins by a vote of 4-3. *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973) (JA 52).

The Supreme Court of Georgia characterized the "threshold question" as being "whether or not the showing of the film Carnal Knowledge violates [Georgia] Code Ann. Ch. 26-21 prohibiting the distribution of obscene materials" (JA 52). Although Jenkins had been charged only with a violation of §26-2105 (exhibition of a film portraying acts which would constitute "public indecency") and although that provision does not mention the word "obscene," the Supreme Court of Georgia held that it should be "construed together" with §26-2101(b) (obscenity) and that, as so construed, it could be applied in accordance with "local" com-

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in the Supreme Court of Georgia, pages 4-5. (Copies of the briefs in the Supreme Court of Georgia are on file with the Clerk of this Court.)

munity standards (JA54). On the basis of this rationale, the Court concluded that the statute was constitutional; that the trial judge's instructions to the jury were "proper"[9]; and that, having viewed the film, Appellant's conviction should be affirmed (JA52-55).

The dissents in the Supreme Court of Georgia expressed surprise and shock that "Carnal Knowledge" could be denied First Amendment protection under *any* constitutional formula (Gunter, J., dissenting, JA56; Hawes, J., dissenting, JA67). According to Justice Gunter, the majority's finding that the film was obscene "teaches me that the 'alarm of repression' was validly sounded" by the four Justices of this Court who dissented in *Miller* and its companion cases (JA 64).

Both dissents also considered the majority's use of *Miller* to be a violation of due process, since Appellant's conviction was affirmed under legal standards altogether different from and less exacting than those which existed at the time the offense allegedly was committed (Gunter, J., dissenting, JA56-61; Hawes, J., dissenting, JA67).

Justice Gunter also disagreed with the majority's construction of §26-2105, which he maintained was "patently unconstitutional" and incapable of rehabilitation (JA65).

Justice Undercofler also dissented, but did not file an opinion.

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[9]The Supreme Court of Georgia's opinion does not expressly mention the fact that the trial judge's instructions to the jury included Georgia Code Ann. §26-2101(c) ("pandering" or intent to pander). It does, however, expressly hold that the trial judge's instructions were "proper."

SUMMARY OF ARGUMENT

I. *The film "Carnal Knowledge" is not obscene.* The Supreme Court of Georgia's 4-3 decision holding "Carnal Knowledge" obscene clearly violates the First Amendment, since the film cannot be found obscene under *any* constitutional formula. If the film itself is the best evidence of what it represents, then a viewing of "Carnal Knowledge" clearly shows that it has serious literary and artistic value, and therefore is not obscene. Whether a particular work possesses serious literary and artistic value depends upon the work's intrinsic merits, and has nothing whatsoever to do with community standards.

In addition, even if "Carnal Knowledge" were devoid of literary and artistic value, it would still not be obscene because it does not appeal to the prurient interest and does not portray sexual conduct in a patently offensive way. The Supreme Court of Georgia's decision to the contrary seriously distorts the intended reach of this Court's obscenity decisions of June 21, 1973.

II. *Georgia Code Ann. §26-2105 is unconstitutional on its face, as applied and as construed by the Supreme Court of Georgia.* The trial judge's instructions to the jury in this case encompassed three separate and distinct statutory provisions, all of which were unconstitutional as applied: Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency") was void for overbreadth; Georgia Code Ann. §26-2101(b) (obscenity) was void because it was not limited in application to portrayals of specific sexual conduct and was applied in accord-

ance with "local" community standards; and Georgia Code Ann. §26-2101(c) ("pandering" or intent to pander) was void because it was not limited in application to "close cases" and was also impermissibly vague.

Moreover, in affirming Appellant's conviction on the basis of its holding that §§ 26-2105 and 26-2101(b) were to be "construed together," the Supreme Court of Georgia rendered §26-2105 hopelessly void for vagueness. As of July 2, 1973, it is impossible to determine, for example, to what depictions or descriptions of sexual conduct §26-2105 applies; by what penalty provision its application is governed; and whether it will be applied in accordance with statewide or "local" community standards. In addition, the Supreme Court of Georgia's failure to define the geographic scope and nature of the "local" communities by whose standards films and other material may be evaluated makes those standards impermissibly vague.

III. *It is constitutionally impermissible to employ "local," as distinguished from statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material.* The Supreme Court of Georgia's holding that it is permissible to employ "local" standards violates the First Amendment, because it is impermissible in any case to employ "local," as distinguished for statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material. *First*, application of thousands upon thousands of "local" standards creates a substantial "chilling effect" and also imposes a burden on interstate commerce which is considerably more than "incidental." In addition, and most importantly, when a determination of obscenity made on the basis of "local"

standards is affirmed by the highest court of a state, that decision inevitably and effectively deters sale or exhibition of the material involved throughout the state. *Second*, "local" standards are unworkable in adjudicating obscenity cases because they will confront this Court and other courts with impossible problems in determining what constitutes an appropriate "local" community. Accordingly, this Court should hold that the community standards applicable under state obscenity laws must be at least statewide in scope.

IV. *Appellant was denied due process of law in the proceedings below, including those in the Supreme Court of Georgia.* The trial judge's instructions to the jury in this case encompassed three separate, distinct and substantially different statutory provisions, even though Appellant had been accused of violating only one of them. Since there is a substantial possibility that the jury's general verdict of guilty was infected by these instructions, Appellant's conviction must be reversed because of possible conviction upon a charge not made and because the instructions included a charge ("pandering" or intent to pander) for which there was absolutely no evidentiary support. Moreover, Appellant's conviction must be reversed because all three of the statutory provisions possibly underlying his conviction were unconstitutional. Furthermore, by holding that §§26-2105 and 26-2101(b) were to be "construed together," the Supreme Court of Georgia deprived Appellant of due process of law by affirming his conviction on the basis of its retroactive application of a statutory construction which was altogether unforeseen and unforeseeable. Finally, the Supreme Court of Georgia also deprived Appellant of due process of law insofar as it departed from certain well-established Georgia precedents in affirming his conviction.

ARGUMENT

I.

THE FILM "CARNAL KNOWLEDGE" IS NOT OBSCENE

This Court "must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller* v. *California*, 413 U.S. 15, 23 (1973). The *Miller* decision emphasized the need for shielding serious literary and artistic works from overzealous prudery while at the same time denying protection to "hard core pornography." This Court's "independent review of constitutional claims" therefore continues to be available "when necessary." *Id.* at 25. And, as Justice Gunter said in dissent in the Supreme Court of Georgia, if there is ever to be a case in which such review is necessary, "then the case at bar is the case" (JA62). If not reversed, the Supreme Court of Georgia's decision in this case will set a pattern for repressiveness; creativity would be subjected to inhibiting perils inimical to the universally accepted objective of the First Amendment.

Although this Court's obscenity decisions of June 21, 1973, were expressly directed only against "the public portrayal of hard core sexual conduct for its own sake," *Miller* v. *California*, *supra* at 35,[10] there can

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[10] "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct. . . . A state offense must also be limited to works which, taken as a whole, appeal to the prurient

be no doubt that those decisions have already had "radiating consequences"[11] which have seriously distorted their intended reach, of which the Supreme Court of Georgia's decision in this case is the most obvious example.[12] If such unintended "radiating consequences" are not to become the norm, then works such as "Carnal Knowledge" must be distinguished from "hard core pornography."[13] "The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor. . . ." *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 684 (1968). They involve nothing less than "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

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interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 27, 24.

[11]See Bickel, *The Least Dangerous Branch* 140 (1962) for the view that, no matter how carefully circumscribed, decisions such as those rendered by this Court on June 21, 1973, "will have radiating consequences, and that these will be to encourage Comstockian tendencies."

[12]See, e.g., "See No Evil," *Time*, July 16, 1973, page 73, column 2, for the view that the Supreme Court of Georgia's decision in this case finding "as serious a film as *Carnal Knowledge*" to be obscene "indicates how drastically the Supreme Court's rules may be interpreted, or misinterpreted, by local authorities trying to decide what may or may not be seen by the public."

See also: "Fears of Local Censorship Haunt the Book Trade," *The New York Times*, January 8, 1974, page 26.

[13]The issue here is obscenity *per se*. Appellant did not permit anyone under the age of 18 years to view the film (JA 24, 25). Nor was there any evidence of "obtrusive" exhibition or, despite the trial judge's instructions, "pandering."

A. The film

"Carnal Knowledge" has been hailed by distinguished critics as a serious work. The film has also been accepted by many millions throughout the nation[14]. It has played in cities large and small, including many within the State of Georgia.[15] Other than in this case, the film has never been held obscene. It is one of the most widely acclaimed films of recent years,[16] and appeared on many "10 Best" lists for 1971,[17] the year in which it was first released. It combines the talents of many of America's leading contemporary artists — e.g., Mike Nichols (producer-director),[18] Jules Feiffer (screen-writer),[19] and Jack Nicholson (actor).[20] The

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[14]*Variety*, January 5, 1972, page 9, lists the film among the 10 most popular for the year 1971.

[15]Including Cordele, Valdosta, Douglas, Macon, Fitzgerald, Savannah, Milledgeville, Augusta, Dalton, Rome, Gainesville, Carlton, and Atlanta (JA 24).

[16]See, e.g., the various reviews cited in Justice Gunter's dissent in the Supreme Court of Georgia (JA 59).

[17]Including *The Oakland Tribune* (Robert Taylor); *The Norfolk Virginian Pilot* (Mal Vincent); *The New York Times* (Vincent Canby); *The Philadelphia Inquirer* (William Collins); *The Boston Sun Advertiser* (Michael Janusonis); *The Nashville Tennesseean* (Harry Haun); *The Cleveland Plain Dealer* (Emerson Batdorff); *The Houston Chronicle* (Jeff Millar); *The Chicago Daily News* (Dond Elliot); *The Denver Post* (Barry Morrison); *The Oregonian* (Ted Mahar); and *Cue* (William Wolf).

[18]Nichols' other films are "Who's Afraid of Virginia Woolf?," "The Graduate," "Catch-22" and "The Day of the Dolphin."

[19]Although noted primarily as a cartoon satirist, Feiffer was also author of the play and later the screenplay for "Little Murders."

[20]Nicholson's other films include "Easy Rider" and "Five Easy Pieces."

film deals with sex, but then sex "has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States*, 354 U.S. 476, 487 (1957). "[S]ex and obscenity are *not* synonymous." *Ibid.* (emphasis added).

"Carnal Knowledge" is basically "the story of two young men who grow older without growing up"[21] and who, over the course of three decades, "succeed" in driving sex — and with it themselves — into the ground. A brief description of the film is set forth below in portions of a review cited by Justice Gunter in his dissent in the Supreme Court of Georgia (JA 59). (A full copy of this review is contained in an appendix to this Brief.)

> The structure of the film is daring. The time span encompasses more than twenty years from the late 1940s to the late 1960s. We are never given precise dates, but we are oriented, easily enough, by songs on the soundtrack, by styles of dress, by subtle changes in decor . . .
>
> [It is basically a story] of two young college men, roommates and lifelong friends forever preoccupied with their sex lives. Both are first met as virgins. Nicholson is the more knowledgeable and attractive of the two; speaking colloquially, he is a burgeoning bastard. Art Garfunkel is his friend, the nice but troubled guy straight out of those early Feiffer cartoons, but *real*. He falls in love with the lovely Susan (Candice Bergen) and unknowingly shares her with his college buddy.

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[21]Paul D. Zimmerman, *Newsweek*, July 5, 1971, page 71.

As the "safer" one of the two, he is selected by Susan for marriage.

The time changes. Both men are in their thirties, pursuing successful careers in New York. Nicholson has been running through an average of a dozen women a year but has never managed to meet the right one, the one with the full bosom, the good legs, the properly rounded bottom. More than that, each and every one is a threat to his manhood and peace of mind, until at last, in a bar, he finds Ann-Margret, an aging bachelor girl with striking cleavage and, quite obviously, something of a past. "Why don't we shack up?" she suggests. They do and a horrendous relationship ensues, complicated mainly by her paranoidal desire to marry. Meanwhile, what of Garfunkel? The sparks have gone out of his marriage, the sex has lost its savor, and Garfunkel tries once more. And later, ever more foolishly, again.

. . . A cruel film perhaps, but an essentially honest one. Not only is the film, overall, the best-acted in years; it is also the most mature of all those American films that have attempted to deal with the subject of sex in these ultra liberated cinematic times. [Hollis Alpert, *Saturday Review*, July 3, 1971, page 18].

A few excerpts from reviews by leading critics demonstrate the general view of the film as a serious literary and artistic work.

In the end there is no real triumph for the characters. Different attitudes, perhaps, but no triumph . . . . It is a movie that will be controversial

in the heaviest sense of the word, but it is still one of the best that we have had in a long time. [Terry Kay, *The Atlanta Journal*, July 1, 1971, also cited by Justice Gunter, JA 59].

It's a very funny and very cruel and very sad film that marks, for me, Nichols' coming-of-age as a film director. It is the first of his films to have a total and personal style, to use the screen as it has rarely been used heretofore for character study and the probing of personality . . . . Unlike too many of today's films, *Carnal Knowledge* lasts beyond the watching; it sticks to the mind-ribs and bears long retrospection: a feast of a film. [Judith Crist, *New York*, July 5, 1971]

Nichols and Feiffer have made a movie that is not only very funny, but in a casual way — in the way of something observed in a half-light — more profound than much more ambitious films. [Vincent Canby, *The New York Times*, July 1, 1971].

B. "Carnal Knowledge" is not obscene under any constitutional formula

Under Georgia Code Ann. §26-2101(b), the test for obscenity which was retained and applied by the Supreme Court of Georgia in this case (JA53-54), "[m]aterial is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

Under the standard most recently announced by this Court in *Miller* v. *California*, *supra* at 24, the test for obscenity is: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The film "Carnal Knowledge" is not obscene under either of these tests, as shown hereinafter.

C. The film is not "utterly without redeeming social value"

The "utterly without redeeming social value" test, retained and applied by the Supreme Court of Georgia in this case, is within constitutional boundaries as *part* of the test of obscenity. There is no clearer basis for reversal in this case than the determination by the Supreme Court of Georgia that "Carnal Knowledge" is obscene under this standard. Whether one agrees or disagrees with the ideas expressed in "Carnal Knowledge," it most definitely is not "utterly without redeeming social value." See, e.g., *Cain* v. *Kentucky*, 397 U.S. 319 (1970) (per curiam); *Bloss* v. *Michigan*, 402 U.S. 938 (1971); *Hartstein* v. *Missouri*, 404 U.S. 988 (1971).

D. The film clearly possesses serious literary and artistic value, and therefore is fully protected by the First Amendment

In *Miller* v. *California*, *supra* at 26, this Court held that a work is fully protected by the First Amendment

if, "[a]t a minimum," it possesses "serious literary, artistic, political, or scientific value." It cannot be doubted that "Carnal Knowledge" possesses the requisite serious literary and artistic value. Indeed, it is far superior in accomplishment, and far less explicit in treatment, than material which this Court has only recently held *not* to be obscene. In *Kois* v. *Wisconsin*, 408 U.S. 229 (1972) (per curiam),[22] this Court had before it a "Sex Poem" which was "an undisguisedly frank play-by-play account of the author's recollection of sexual intercourse." *Id.* at 231. Nevertheless, this Court held that the "Sex Poem" was not obscene because "it bears some of the earmarks of an attempt at serious art." *Ibid.*

At a minimum, "Carnal Knowledge" is much more than merely "an attempt at serious art," and countless film critics have so recognized — e.g., "[t]he best film to date in 1971. The most honest picture ever made of the way American men and women treat each other."[23] Indeed, even those critics who were less than enthusiastic about the film did not question its seriousness. For example, *Catholic Film Newsletter* thought the film as a whole operated too much on the "surface," but noted that it is "at times a perceptive and even brilliant put-down of a life style that reduces human beings to sex organs."[24]

However, the Supreme Court of Georgia, by the narrowest of margins (4-3), held "Carnal Knowledge"

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[22]Although decided in 1972, *Kois* is cited with approval in this Court's decision of June 21, 1973, in *Miller* v. *California*, *supra* at 24-25.

[23]Mary Knoblauch, *Chicago Today*, July 4, 1971.

[24]*Catholic Film Newsletter*, July 30, 1971.

to be obscene. But as Justice Gunter said in dissent (JA 63):

> If the motion picture "Carnal Knowledge" is not entitled to judicial protection under the First Amendment's umbrella, then future productions in this art form utilizing a sexual theme are destined to be obscenely soaked in the pornographic storm.

If the film itself is the best evidence of what it represents, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973), then a viewing of "Carnal Knowledge" clearly shows that it possesses serious literary and artistic value, and therefore is not obscene.[25]

E. The existence of serious literary or artistic value does not depend upon community standards

Serious literary or artistic value is not extinguished by the failure, for whatever reason, of those in a particular community to comprehend or appreciate a work. For example, a serious literary work survives even the illiteracy of the viewer or the reader. The intrinsic merits of a work do not vary from community to community; nor are they controlled by a community's opinions on sex or morality.

"The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, *regardless* of whether the government or a majority of the people approve of the ideas these works represent." *Miller v. California*,

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[25] A print of the film is on file with the Clerk of this Court as part of the Record in the Supreme Court of Georgia.

supra, at 34 (emphasis added). "[F]undamental First Amendment limitations on the powers of the States do *not* vary from community to community." *Id* at 30 (emphasis added). Nothing is more "fundamental" than that the First Amendment fully protects works which possess serious literary or artistic value.

The Supreme Court of Georgia's opinion in this case is so ambiguous that it is impossible to determine what parts of the obscenity test employed in this case were governed by community standards. However, in its most recent obscenity decision, *Slaton v. Paris Adult Theatre I*, — Ga., —S.E.— (Oct. 30, 1973), the Supreme Court of Georgia expressly indicated that *all* parts of the obscenity test, including whether a work possesses serious literary or artistic value, are to be governed by community standards.[26]

To the extent that the Supreme Court of Georgia in this case may have allowed community standards to determine the "value" of "Carnal Knowledge," its judgment must be reversed for this reason also.

Although the fact that "Carnal Knowledge" has serious literary and artistic value warrants reversal without more, the film's lack of prurient interest appeal and patent offensiveness also independently require reversal.

F. The film does not appeal to the prurient interest

"Carnal Knowledge," taken as a whole, clearly does

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[26]The Supreme Court of Georgia's decision of October 30, 1973, in the *Paris* case is set forth in full as the Appendix to Appellant's Reply to Appellee's Motion to Dismiss or Affirm in this case. See, particularly, pages 9-10 of that Appendix.

not appeal to the prurient interest.[27] A work does not appeal to the prurient interest if it " . . . says more to the mind than to the senses; [if] it awakens emotions attached to problems and ideas, not to bodies." Rosenberg, "Trials of Eros," *The New Yorker*, November 4, 1972, page 121 *et seq.* (at page 126).

Like any serious work of art, "Carnal Knowledge" may be viewed from a multiplicity of perspectives and will mean different things to different people.[28] But whatever else one may say about it, the film is not "material having a tendency to excite lustful thoughts." *Roth v. United States*, *supra* at 487 n. 20. Its purpose and effect is to express ideas about the way some

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[27]Although this Court has recently characterized determinations of prurient interest appeal and patent offensiveness as "essentially questions of fact," *Miller* v. *California*, *supra* at 30, they are nevertheless questions of "constitutional fact." *Kois* v. *Wisconsin*, 408 U.S. 229, 232 (1972) (per curiam). Accordingly, these questions are still subject to independent appellate review because "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954).

[28]Not surprisingly, various reviewers have looked at the film in various ways — e.g., a reconsideration of the institution of marriage (Arthur Knight and Hollis Alpert, *Sex in Cinema* 2, 1972); an examination of the perenially adolescent male (Judith Crist, *New York*, July 5, 1971); how people become victims of the life-styles they create for themselves (Terry Kay, *The Atlanta Journal*, July 1, 1971); and the psychic misunderstandings and emotional hurts in male-female relationships (Vincent Canby, *The New York Times*, July 1, 1971). Whatever one's individual view, there is no doubt that the film "does, admittedly, trigger discussion, which means that Nichols has accomplished something" (Kathleen Carroll, New York *Daily News*, July 1, 1971).

people use (and abuse) sexuality. Whether one agrees or disagrees with such ideas, their expression is fully protected by the First Amendment. See, e.g., *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688-689 (1959).

"Carnal Knowledge" contains no more nudity and sex than is justified by their rational relation to its theme. Indeed, the oblique, discreet and very brief manner in which the film portrays its few scenes of nudity and sex belies any intention to exploit them for the sake of appealing to the prurient interest; by ending scenes when their legitimate dramatic point has been made and by careful placement of the camera, the film deliberately avoids any such exploitation. And the film's dialogue, while sometimes blunt, is well within the boundaries of what this Court has already held *not* to be obscene.[29]

The film does not appeal to the prurient interest,[30] and therefore would not be obscene even if it lacked serious literary and artistic value, which it clearly does not.

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[29]*Cohen* v. *California*, 403 U.S. 15 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972) (per curiam); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Lewis* v. *City of New Orleans*, 408 U.S. 913 (1972); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Cason* v. *City of Columbus*, 409 U.S. 1053 (1972); *Papish* v. *University of Missouri Curators*, 410 U.S. 667 (1973) (per curiam); *Hess* v. *Indiana*, — U.S. — (November 19, 1973) (per curiam).

[30]*The Atlanta Journal*, July 1, 1971, summarized the film in the following capsule comment: "*Journal* Guide — Sex, plenty but not in the hard-core sense; Violence, some emotional but not physical; Nudity, a few expressive scenes; Language, rough but not uncommon in certain structures of modern society."

G. The film is not patently offensive

"Carnal Knowledge" does not depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable Georgia law(s). There is absolutely nothing in the film which even remotely approaches "hard core" status.[31]

Insofar as sexual conduct is concerned, it is impossible to determine exactly what portion (or portions) of the film might have been considered offensive by the jury, which returned only a general verdict of guilty. As applied in this case, the trial judge's instructions encompassed two provisions — Georgia Code Ann. §§ 26-2101(b) (obscenity) and 26-2101(c) ("pandering" or intent to pander) — which do not even mention specific sexual conduct. In addition, the Supreme Court of Georgia's opinion did not mention any specific sexual conduct portrayed in the film, nor did it even allude to the *Miller* requirement that obscenity statutes must be limited in application to specifically defined depictions or descriptions of sexual conduct.

In any case, as Justice Hawes remarked in dissent in the Supreme Court of Georgia, "the film under consideration here is *not* the kind of hard-core pornography we removed from public consumption" in *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 185 S.E.2d 768 (1971), vacated and remanded, 413 U.S. 49 (1973) (JA67; emphasis added).

Moreover, given testimony at the trial about the availability of more explicit material in Albany (R. 5,

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[31] See footnote 28, *supra*.

23-46) and given the fact that "Carnal Knowledge" was shown widely and without opposition throughout the State of Georgia, there is substantial doubt as to whether the jury, which returned only a general verdict of guilty, actually did or could have found the film to be patently offensive.

Under these circumstances, whatever weight this Court might otherwise be disposed to accord to jury determinations on this issue cannot apply here, particularly since a finding that "Carnal Knowledge" is patently offensive would be "wholly out of step with current American standards." *Memoirs v. Massachusetts*, 383 U.S. 413, 458 (1966) (dissenting opinion of Harlan, J.).

II.

GEORGIA CODE ANN. §26-2105 IS UNCONSTITUTIONAL ON ITS FACE, AS APPLIED, AND AS CONSTRUED BY THE SUPREME COURT OF GEORGIA

A. The statute is invalid on its face for overbreadth

Motion pictures are a form of expression protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952). A particular film may be suppressed completely only if it is found to be obscene. *Paris Adult Theatre I* v. *Slaton, supra; Jacobellis* v. *Ohio*, 378 U.S. 184 (1964).

On its face, Georgia Code Ann. §26-2105 imposes an absolute prohibition against exhibition of motion

pictures which portray any of the acts enumerated in Georgia Code Ann. §26-2011, the State's "public indecency" law. This *per se* prohibition operates "across the board," cf. *California* v. *LaRue*, 409 U.S. 109, 118 (1972), totally without regard to whether films portraying such acts are obscene. To the extent that it may even be considered an "obscenity" law, §26-2105 makes sex and obscenity synonymous. Cf. *Roth* v. *United States*, *supra* at 487.

For example, §26-2105 flatly prohibits exhibition of any film containing a scene showing "A lewd appearance in a state of partial or complete nudity," even if such a scene lasts only 10 seconds in a two-hour film; even if the scene is rationally related to the theme of the film as a whole; even if the film neither appeals to the prurient interest nor is patently offensive; and even if the film taken as a whole possesses serious literary and artistic value.

On its face, §26-2105 therefore makes no attempt to "distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material." *Miller* v. *California*, *supra* at 36. Its prohibitions are "appallingly overbroad, permitting the suppression of a vast range of literary, scientific, and artistic masterpieces. Neither the First Amendment nor any free community could possibly tolerate such a standard." *Paris Adult Theatre I* v. *Slaton*, *supra* at 94 (dissenting opinion of Brennan, J.).[32]

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[32]The *Paris Adult Theatre* case involved the definition of obscenity set forth in Georgia Code Ann. §26-2101(b). It did not involve §26-2105.

As this Court held in *Cohen* v. *California*, 403 U.S. 15, 26 (1971):

> [W]e cannot indulge the facile assumption that one can forbid particular words without also running a risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.

Although this Court has not previously been confronted with the application of "public indecency" or "indecent exposure" laws to motion pictures and other forms of expression, its prior decisions make it clear that, outside of the constitutionally established exceptions, such as obscenity, "governmental bodies may not prescribe the form or content of individual expression." *Cohen* v. *California*, *supra* at 24. If governments may not censor "particular words as a convenient guise for banning the expression of unpopular views," neither may they prohibit film portrayals of certain conduct for the same purpose.[33]

A law such as Georgia Code Ann. §26-2105 may not constitutionally be applied to any form of expression. Indeed, numerous lower courts have already so held with respect to similar laws. See, e.g., *P.B.I.C.*,

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[33] §26-2105 is clearly aimed at expression, not conduct. Cf. *United States* v. *O'Brien*, 391 U.S. 367 (1968). Even assuming that §26-2105 evidences only a governmental interest in regulating conduct, the resulting restrictions on First Amendment freedoms are clearly intolerable. *Id.* at 376-377. See *Miller* v. *California*, *supra* at 26 n. 8: "... the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." See also: *Schacht* v. *United States*, 398 U.S. 58 (1970).

Inc. v. *Byrne*, 313 F.Supp. 757, 764-765 (D.Mass. 1970) (three-judge court), vacated and remanded to consider mootness, 401 U.S. 987 (1971), affirmed on remand (June 16, 1971), vacated and remanded, 413 U.S. 905 (1973); *Southeastern Promotions, Ltd.* v. *City of Atlanta, Ga.*, 334 F.Supp. 634, 642-643 (N.D. Ga. 1971);[34] *In re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535, 541 (1968), *cert. denied*, 395 U.S. 910 (1969); *Salem Inn, Inc.* v. *Frank*, 364 F.Supp. 478, 483 (E.D.N.Y. 1973).

On its face, §26-2105 is clearly "susceptible of application to protected expression," *Gooding* v. *Wilson*, 405 U.S. 518, 522 (1972), and is therefore unconstitutional.

B. The statute is invalid as applied

Appellant was charged with and tried for a violation of Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency"). Nevertheless, the trial judge's instructions to the jury encompassed the separate, distinct and

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[34]Although it arose several months after April 1, 1971, the effective date of §26-2105, the *Southeastern Promotions* case involved only Georgia Code Ann. §26-2011 ("public indecency"), which enumerates the acts whose portrayal is prohibited by §26-2105. Since it became effective, §26-2105 has been challenged in two other cases, but the issue of its constitutionality was not reached. *Cooley* v. *Endicator*, 340 F.Supp. 15 (N.D. Ga. 1971), *aff'd per curiam*, 458 F.2d 513 (5th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973); *Martin Theatres of Georgia, Inc.* v. *Robert W. Reynolds* (U.S.D.C., M.D.Ga., Albany Division, Civil Action No. 1142, filed October 12, 1971, voluntarily discontinued December 1, 1971).

substantially different offenses defined by Georgia Code Ann. §§ 26-2101(b) (obscenity) and 26-2101(c) ("pandering" or intent to pander), as well as §26-2105. Since the jury returned only a general verdict of guilty and since the Supreme Court of Georgia later held that the trial judge's instructions were "proper" (JA 52), the constitutionality of each of these provisions is an issue in this case.[35]

If the jury based its verdict of guilty on §26-2105, Appellant's conviction must be reversed because the statute was clearly void for overbreadth. (See Point II(A), *supra*.)

If the jury based its verdict of guilty on the definition of obscene material contained in §26-2101(b), Appellant's conviction must likewise be reversed. At least as applied in this case,[36] this provision was not limited in application to material depicting or describ-

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[35]As an organizational matter, we have focused our attack on §26-2105, since it is the provision which Appellant was accused of violating and which the Supreme Court of Georgia purported to construe in this case. However, to the extent that they are involved in this case, either at the trial level or in the Supreme Court of Georgia's decision, the constitutionality of §§ 26-2101(b) and 26-2101(c) is also at issue.

[36]The Supreme Court of Georgia's decision of October 30, 1973, in *Slaton* v. *Paris Adult Theatre I*, *supra*, holding that *as of 1971* §26-2101 (b) had already been limited in application to depictions or descriptions of certain sexual conduct, raises questions about the constitutionality of §26-2101(b) on its face which need not be discussed here. For it is clear that the trial judge's instructions to the jury in this case did *not* limit application of §26-2101(b) to the types of sexual conduct described in the *Paris* case (JA 30-31).

ing specifically defined sexual conduct, and was therefore overbroad. *Miller v. California*, *supra* at 27. In addition, §26-2101(b) was invalid insofar as it was applied in accordance with "local" as distinguished from statewide, community standards.[37] (See Points II(C) and III, *Infra*.)

If the jury based its verdict of guilty on §26-2101 (c), Appellant's conviction must also be reversed. This provision is not only hopelessly vague,[38] *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); it is also overbroad. While this Court has held that actual "pandering" may be relevant to a determination of obscenity "in close cases," *Ginzburg* v. *United States*, 383 U.S. 463, 474 (1966), §26-2101(c) is not so limited in application, nor was it so limited by the trial judge's instructions to the jury in this case.

In short, the trial judge's instructions to the jury encompassed three separate, distinct and substantially different statutes, all of which were applied unconstitutionally in this case. Appellant's conviction must therefore be reversed.

C. The statute is invalid as construed by the Supreme Court of Georgia

Despite the Supreme Court of Georgia's attempt to rehabilitate it in this case, §26-2105 has not yet been construed "so as to avoid all constitutional difficulties."

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[37] See footnote 8, *supra*.

[38] For example, §26-2101(c) purportedly applies to "erotica," a term which is not defined in the statute itself or in any Georgia case. Indeed, there are no Georgia cases either applying or construing §26-2101(c).

United States v. *Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Gooding* v. *Wilson*, *supra* at 528.

Although the Court held that §§26-2105 and 26-2101(b) should be "construed together" (JA 53), its opinion is "so cryptic and devoid of supportive reasoning that it is impossible to define its parameters." Note, 8 Ga. L. Rev. —, — (1973)[39]

For example:

(1) On its face, §26-2105 applies to material portraying acts defined to constitute "public indecency"[40] — "An act of sexual intercourse," "A lewd exposure of the sexual organs," "A lewd appearance in a state of partial or complete nudity," and "A lewd caress or indecent fondling of the body of another person." As of 1971, however, §26-2101(b) had already been limited in application to material depicting or describing different acts — "acts of sexual intercourse, natural, unnatural, bizarre, and violent" and "actual sexual activity, both natural and unnatural."[41]

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[39]The editors of the Georgia Law Review have furnished Counsel for Appellant with the typewritten text of this Note, which will appear in the next issue, 8 Ga. L. Rev. — (1973). A copy of the typewritten text is being filed simultaneously with this Brief and also is being furnished to Counsel for Appellee. Page 7 of the typewritten text contains the language cited above.

[40]§26-2105 merely prohibits the portrayal in a motion picture of the acts which would constitute "public indecency" under Georgia Code Ann. §26-2011. The acts themselves are enumerated in §26-2011.

[41]*Slaton* v. *Paris Adult Theatre I*, *supra* (October 30, 1973). Since the *Paris* decision purports only to restate the types of acts to which §26-2101(b) had been limited in application

Since the Supreme Court of Georgia held in this case that §§26-2105 and 26-2101(b) must be "construed together," it is impossible to determine whether §26-2105 now applies to the acts specified to constitute "public indecency," *or* to the acts to which §26-2101(b) has applied since 1971, *or* to both types of acts. (Indeed, the Supreme Court of Georgia's opinion in this case, although handed down on July 2, 1973, does not even allude to the *Miller* requirement that obscenity statutes must be limited in application to depictions or descriptions of specifically defined sexual conduct.)

The constitutional problems are only compounded by reference to the respective acts encompassed by §§26-2105 and 26-2101(b). For example, the "lewd appearance in a state of partial or complete nudity" and "lewd caress or indecent fondling of the body of another person" which are encompassed by §26-2105 cannot be considered "examples" of the type of "hard core sexual conduct" which this Court intended to reach in its decisions of June 21, 1973. *Miller* v. *California*, *supra* at 25, 35.[42] Cf. *Hunt* v. *Keriakos*, 428 F.2d 606 (1st Cir. 1970), *cert. denied*, 400 U.S. 929 (1970).

The problem here, in short, is not that citizens are

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as of 1971, it may of course be considered in determining the validity of §26-2105 as construed by the Supreme Court of Georgia in this case on July 2, 1973. Cf. *Wainwright* v. *Stone*, — U.S. — (November 5, 1973) (per curiam).

[42] "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. / (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

compelled to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958); the problem here is that Appellant and other Georgia motion picture exhibitors[43] can't possibly have any notion of what constitute the "forbidden areas."

(2) Another reason why §26-2105 is now unconstitutional is that, on their face, §§26-2105 and 26-2101(b) have separate and different penalty provisions.[44] However, since the two statutes must now be "construed together," it is impossible to determine which penalty provision now governs §26-2105.

(3) Material which is obscene under §26-2101(b) is subject to a special tax.[45] Again, since §§26-2105 and

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[43]Appellant, of course, clearly has standing to challenge the validity of §26-2105 not only as applied to him, but also as it might be applied to others. See, e.g., *Gooding* v. *Wilson*, *supra* at 521; *Coates* v. *City of Cincinnati*, *supra* at 616; *Baggett* v. *Bullitt*, *supra* at 366.

[44]Under §26-2101(d) an initial violation of §26-2101 constitutes a misdemeanor, but any subsequent violations constitute a felony. Under §26-2105, by contrast, both the initial and subsequent violations constitute only a misdemeanor.

[45]Georgia Code Ann. Ch. 92-21A (Georgia Laws 1970 Session, p. 443) imposes a tax of $500.00 on each sale of an obscene item. Since this provision was adopted prior to the enactment of §26-2105 and since §26-2105 on its face neither contains nor implies the concept of obscenity, this special tax clearly was not intended to apply to material proscribed by §26-2105. However, in view of the Supreme Court of Georgia's decision in this case that §§ 26-2101(b) and 26-2105 must be "construed together," this question is not now free of ambiguity.

26-2101(b) must now be "construed together," does this tax now apply to material proscribed by §26-2105?

(4) The Supreme Court of Georgia held that §26-2105 could be applied in accordance with either statewide or "local" community standards. Appellant and other Georgia motion picture exhibitors are therefore left to guess whether, in any possible prosecution, they will be subject to statewide or "local" standards.

Moreover, insofar as "local" standards are concerned, the Supreme Court of Georgia has failed to define either the geographic parameters or nature of the "local" communities by whose standards films and other material will be evaluated. The statute is therefore void for vagueness because it is impossible to determine whether "local" means region, county, city, neighborhood, or whatever. Such uncertainty not only fails to give "fair warning," but also inhibits the exercise of First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). (Moreover, even if they are defined precisely, Appellant believes it is constitutionally impermissible in any case to employ "local," as distinguished from statewide, community standards, and that §26-2105 as construed in this case is invalid for this reason also. Because of the importance of this issue, it is treated as a separate point. See Point III, *infra.*)

In summary, §26-2105 as construed by the Supreme Court of Georgia in this case clearly fails to give persons of ordinary intelligence "fair notice" of exactly what it prohibits and, in addition, encourages arbitrary and erratic arrests and convictions. See, e.g., *Papachristou* v. *City of Jacksonville*, 405 U.S. 156,

162 (1972). And while this Court undertook in *Miller* v. *California*, *supra* at 20, 27, "to formulate standards more concrete than those in the past" so that obscenity laws would "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution," the Supreme Court of Georgia's decision in this case has led §26-2105 in exactly the opposite direction — indeed, it is now so vague that Appellant and other Georgia motion picture exhibitors "must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

III.

IT IS CONSTITUTIONALLY IMPERMISSIBLE TO EMPLOY "LOCAL," AS DISTINGUISHED FROM STATEWIDE, COMMUNITY STANDARDS IN EVALUATING THE PRURIENT INTEREST APPEAL AND PATENT OFFENSIVENESS OF ALLEGEDLY OBSCENE MATERIAL

In *Miller* v. *California*, *supra* at 33-34, this Court held that the trial court's use of the "contemporary standards of the State of California" in evaluating the material in question was "constitutionally adequate." "People in different *States* vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33 (emphasis added). See also: *Kaplan* v. *California*, 413 U.S. 115, 121 (1973).

By so holding, we believe this Court meant only to sanction the use of *statewide* community standards, not

the standards of the countless localities within a state.[46]

Nevertheless, because of a reference in the Court's opinion to Las Vegas and New York City, *Miller* v. *California*, *supra* at 32, as well as a reference in the *Miller* syllabus to the "forum community,"[47] this question has engendered a considerable amount of confusion and conflict.

Some post-*Miller* decisions hold that the applicable community standards may be "local." See, e.g., *Rhodes* v. *State*, 283 So.2d 351, 358 (Supreme Court of Florida, September 19, 1973); *Brazelton* v. *State*, 282 So.2d 342, 343 (Ala.Ct.Crim.App., June 29, 1973). Others hold that the applicable community standards must be statewide in scope. See, e.g., *State* v. *J-R Distributors, Inc.*, 512 P.2d 1049, 1065 (Supreme Court of the State of Washington, July 27, 1973), petition for certiorari pending (No. 73-937); *People* v. *Heller* (New York Court of Appeals, No. 184/71, December 28, 1973). And one court has even held that *both* statewide and "local" standards should be applied. *Richards* v. *State*, 497 S.W.2d 770, 777 (Texas Ct.Civ.App., July 2, 1973).

Commentators are likewise divided on this issue. Compare Leventhal, "The Round of Obscenity-Por-

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[46]See also: *Cain* v. *Kentucky*, 397 U.S. 319 (1970) (per curiam) (dissenting opinion of Burger, C.J.); *Walker* v. *Ohio*, 398 U.S. 434 (1970) (per curiam) (dissenting opinion of Burger, C.J.); *Hoyt* v. *Minnesota*, 399 U.S. 524 (1970) (per curiam) (dissenting opinion of Blackmun, J.). All of these opinions refer to *states*, not localities with a state.

[47]The syllabus, of course, is not part of the Court's opinion. *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337 (1906).

nography Decisions," 59 A.B.A.J. 1261, 1262-1263 (1973) ("local" standards are probably permissible), with Note, 8 Ga.L.Rev. —, — (1973) (community standards must be statewide).

Most strikingly, in Georgia there are now two post-*Miller* decisions by the State's highest court — *Jenkins* v. *State*, *supra* (July 2, 1973) ("local" standards are permissible), and *Slaton* v. *Paris Adult Theatre I*, *supra* (October 30, 1973) (standards must be statewide) — which reach contradictory conclusions as to what community standards may or must be applied.[48]

The Supreme Court of Georgia's failure to define the geographic parameters and nature of the "local" community makes the concept void for vagueness. (See Point II(C), *supra*.)

However, a broader issue is also involved in this case. Appellant believes that, even if the applicable "local" community is defined precisely, it is still constitutionally impermissible to employ "local," as distinguished from statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material,[49] and that

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[48]In *Jenkins*, the Supreme Court of Georgia affirmed the conviction of Appellant in this case on the basis of its holding that it was permissible to apply "local" community standards. Accordingly, despite that Court's later decision in *Paris*, the constitutional propriety of "local," as distinguished from statewide, community standards continues to be an issue before this Court in this case.

[49]Applicable community standards do *not* govern determination of whether material lacks serious literary or artistic value. Determination of this issue depends on the material's intrinsic merits, not community standards. See Point I (E), *supra*.

§26-2105 as construed in this case violates the First Amendment for this reason also. Because of the conflict among post- *Miller* decisions on this question, its resolution by this Court would be an essential guide for the future.

(1) If "local" community standards are applied, the most readily apparent consequence is the intolerable "chilling effect" upon creators and distributors who are subjected to thousands upon thousands of "local" community standards. For a national *disseminator* of First Amendment material (e.g., book and magazine publishers, film distributors, etc.) to keep track of and to cope with 50 different state standards is difficult enough, but to do so with thousands upon thousands of "local" standards would be absolutely impossible. Under these circumstances, a "local" standard not only "operates to inhibit the exercise of [First Amendment] freedoms," *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961), but also imposes a burden on interstate commerce which is considerably more than "incidental". *Cf. Miller v. California*, *supra*, at 32-33 n. 13.

For an *exhibitor* or *seller* of material, application of "local" community standards creates an even stronger "chilling effect." For when a determination of obscenity made on the basis of "local" standards is affirmed by the highest court of a state, that decision and the wide-spread publicity which accompanies it create a devastating impact which effectively deters sale or exhibition of the material involved throughout the state.[50] Since "[p]articularly in the case of motion pic-

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[50]Cf. Coffin, Ch.J., concurring in *United States* v. *One Reel of Film*, 481 F.2d 206, 210-211 (1st Cir., July 16, 1973). Chief

tures, it may take very little to deter exhibition in a given locality" *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965), exhibitors in *other* localities within the state obviously will not run the risk of criminal prosecution by showing the film involved. As Justice Hawes pointed out in dissent below, the effect of the Supreme Court of Georgia's approval of "local" community standards in this case is:

> . . . . . to place in the hands of the few the tastes and the cultural advancement of the many who are members of the greater state community and to deny in large measure the basic freedoms of individuals to participate as they will in the general commerce of ideas. [JA 67]

What may be seen by the citizens of an entire state should therefore at least be governed by the community standards of the entire state.

(2) Application of "local" standards will also confront this Court and other courts with impossible

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Judge Coffin would hold that "national" community standards must continue to govern obscenity determinations pursuant to 19 U.S.C. §1305, since otherwise the standards of the community surrounding the port of entry would dictate what might be seen across the nation. (The other two judges did not reach this issue. *Id.* at 208 n. 2.)

We do not consider here what community standards should apply in federal obscenity prosecutions, except to note that the current permissibility of intervening district venue, *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D.D.C. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 457 (1968), may raise in federal obscenity cases problems somewhat analogous to those discussed above in connection with state proceedings under state laws.

problems in determining what constitutes an appropriate "local" community. For example, "[i]s a college bookstore governed by the standards of the college community or of the town or county in which the college is located?" Leventhal, "The 1973 Round of Obscenity-Pornography Decisions," *supra* at 1263.

As the Supreme Court of California held several years ago in choosing statewide over "local" standards, *In re Giannini, supra,* 446 P. 2d at 547:

> . . . . . on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller community: whether it should be city, county, individual neighborhood within the city, or whatever. Moreover, a strong policy favors uniformity in the application of state criminal law [citation omitted]; we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform "community".

Simply in terms of adjudicating obscenity cases, a "local" standard is completely "unworkable".[51]

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[51] "Community standards must be statewide. If we adopt local standards, are they to be on a city basis, county basis, circuit court basis, or some other basis? Should something be determined not obscene in Milwaukee and yet be obscene in Pepin county? Is there to be a separate standard for metropolitan areas different from rural areas? Are the federal courts in Wisconsin to follow the community standards of the state courts or is there to be one standard in the Eastern District and another in the Western District because the juries are drawn from different districts? If the jury is waived, what then is the area of the local standard? If a national standard

IV.

APPELLANT WAS DENIED DUE PROCESS OF LAW IN THE PROCEEDINGS BELOW, INCLUDING THOSE IN THE SUPREME COURT OF GEORGIA

All of the proceedings below, including those in the Supreme Court of Georgia, are part of the due process of law under which Appellant's conviction must "stand or fall." *Frank* v. *Mangum*, 237 U.S. 309, 327 (1915).

A. Conviction upon a charge not made

"A person's right to reasonable notice of a charge against him . . . [is] basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948). "Conviction upon a charge not made would be sheer denial of due process." *Dejonge* v. *Oregon*, 299 U.S. 353, 362 (1937).

Appellant was accused *only* of violating Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency").[52]

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is unworkable, as *Miller* says it is, I find a local standard even more unworkable than national standards." Hallows, C.J., dissenting in part in *State ex rel. Chobot* v. *Circuit Court for Milwaukee County* (Supreme Court of Wisconsin, August Term, 1973, State No. 179, December 10, 1973). (The majority of the Court in the *Chobot* case did not reach the issue of what constitutes the applicable community.)

[52]Under Georgia law, this accusation was binding upon the State. See, e.g., *Wood* v. *State*, 219 Ga. 509, 134 S.E.2d 8 (1963). Indeed, Georgia courts have consistently reversed

Nevertheless, the trial judge's instructions to the jury allowed it to convict him of any one of three separate, distinct and substantially different offenses: §26-2105; §26-2101(b) (obscenity); and §26-2101(c) ("pandering" or intent to pander). Since the jury returned only a general verdict of guilty, it is impossible to determine whether it convicted him of one, two or all three of these offenses.

Therefore, since there is a substantial possibility that the jury's general verdict of guilty was infected by conviction upon a charge not made, Appellant's conviction must be reversed. See, e.g., *Wardius* v. *Oregon*, 412 U.S. 470, 479 (1973).

B. No evidence to support conviction for "pandering"

The trial judge's instructions to the jury included

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convictions based upon jury instructions which deviated even in minor respects from the language of an accusation. See *Bennett* v. *State*, 108 Ga.App. 265, 132 S.E.2d 816 (1963) (accusation was illegal possession of "alcohol," but jury instructions encompassed "alcohol, or any alcoholic compound"); *Campbell* v. *State*, 106 Ga.App. 588, 127 S.E.2d 816 (1962) (accusation employed language from one section of a chapter, but jury instructions encompassed that section plus other sections of the same chapter); *Locklear* v. *State*, 94 Ga.App. 969, 96 S.E.2d 283 (1956) (accusation employed the word "whiskey," but jury instructions employed the word "liquor").

We do not challenge the Supreme Court of Georgia's right to depart from these precedents as a matter of state law. We do, however, challenge its right to do so when, as here, such a departure deprives a defendant of due process of law. In addition to the points discussed in the text above, this is another ground upon which Appellant was denied due process.

§26-2101(c), even though there was not a single word of evidence which even remotely suggested that "pandering" was an issue. Since there is a substantial possibility that the jury's general verdict of guilty was infected by this instruction, Appellant's conviction must be reversed because conviction for "pandering" is so totally devoid of evidentiary support as to violate due process in and of itself. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961); *Gregory* v. *City of Chicago*, 394 U.S. 111, 112 (1969); *Douglas* v. *Buder*, 412 U.S. 430, 432 (1973) (per curiam).

C. Unconstitutionality of statute(s) underlying conviction

Since the trial judge's instructions to the jury encompassed three separate and distinct statutory provisions and since the jury returned only a general verdict of guilty, Appellant's conviction must be reversed as a denial of due process if any one of these provisions was unconstitutional. *Stromberg* v. *California*, 283 U.S. 359, 369-370 (1931). For the reasons set forth above (see Point II (A,B), *supra*), Appellant believes that *all* three provisions were unconstitutional.

D. Retroactive application of an unforeseen and unforeseeable statutory construction

In affirming Appellant's conviction, the Supreme Court of Georgia "performed a remarkable job of plastic surgery upon the face" of §26-2105 (exhibition of a film portraying acts which would constitute "public indecency"), holding that it "really meant some-

thing quite different" from what it clearly said. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153-154 (1969).

Indeed, the Supreme Court of Georgia's decision in this case that §§26-2105 and 26-2101(b) (obscenity) were to be "construed together" was wholly unforeseen and unforeseeable.[53] A reading of these provisions on their face indicates exactly the contrary: that they were separate and distinct provisions and could not be construed together. For example:

(1) §§26-2101 and 26-2105 do not refer to each other, were passed by different legislatures — in 1968 and 1971, respectively [54] — and have separate and different penalty provisions.[55]

(2) §26-2101(b) applies to anyone who distributes obscene material — i.e., anyone who "sells, lends,

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[53] *Touchton* v. *Echols County*, 211 Ga. 85, 84 S.E.2d 81 (1954), upon which the Supreme Court of Georgia relied in support of its holding that the two provisions should be "construed together" (JA 53), was a *civil* proceeding not involving any criminal penalties. Cf. *Wood* v. *State*, *supra* (failure of a statute defining bribery to provide for punishment could not be cured by reference to the penal provision of another bribery statute to which the deficient statute did not allude; conviction reversed).

We do not challenge the Supreme Court of Georgia's departure from the *Wood* precedent in this case as a matter of state law. Again, however, we do challenge that departure insofar as it deprived Appellant of due process of law. See footnote 53, *supra*.

[54] §26-2101 (a), however, was amended in 1971 in a manner which is not relevant here. (Georgia Laws 1971 Session, p. 344.)

[55] See footnote 45, *supra*.

rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates." Georgia Code Ann. §26-2101 (a). By contrast, §26-2105 applies to persons who perform certain conduct, as well as to anyone "who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of" material embodying such conduct. Georgia Code Ann. §26-2105(a, b).

(3) §26-2105 applies to material portraying acts defined to constitute "public indecency"[56] — "An act of sexual intercourse," "A lewd exposure of the sexual organs," "A lewd appearance in a state of partial or complete nudity" and "A lewd caress or indecent fondling of the body of another person." As of 1971, by contrast, §26-2101(b) had already been applied to material portraying acts different from those encompassed by §26-2105.[57]

(4) §26-2101(b) is to be applied in accordance

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[56]See footnote 41, *supra*.

[57]See *Gornto* v. *State*, 227 Ga. 46, 178 S.E.2d 894, 896 (1970), *cert. denied*, 402 U.S. 933 (1971): "photographic depictions of nudity (including unclothed human male and female genitalia in close proximity) and acts of homosexuality, sadism and masochism, and verbal descriptions (in coarse, vulgar language) of acts of masturbation, homosexuality, sodomy, bestiality, sexual intercourse (fornication), sadism and masochism"; *Evans Theatre Corporation* v. *Slaton*, 227 Ga. 377, 180 S.E.2d 712, 714 (1971), *cert. denied*, 404 U.S. 950 (1971): "acts of sexual intercourse, natural, unnatural, bizarre, and violent," and castration; *Walter* v. *Slaton*, 227 Ga. 676, 182 S.E.2d 464, 467 (1971), *cert. denied*, 404 U.S. 1003 (1971): "actual sexual activity, both natural and unnatural, of the most salacious character"; 1024 *Peachtree Corporation* v. *Slaton*, 228 Ga. 102, 184 S.E.2d 144, 145-146 (1971):

with "community standards."[58] §26-2105, by contrast, makes no mention of community standards; indeed, as a state statute of general application, it expresses a statewide community standard.

Under these circumstances, "[n]o fair reading" of §26-2105 could have possibly informed Appellant that it would be "construed together" with §26-2101(b). *Cohen* v. *California*, *supra* at 19. Indeed, §26-2105 neither contains nor implies the concept of obscenity. In addition, "[n]o fair reading" of §26-2105 could "be said sufficiently to inform the ordinary person that distinctions between certain locations [within the State of Georgia] are thereby created." *Ibid.* It would therefore have taken "extraordinary clairvoyance" for Appellant to have guessed, let alone known, that the clear language of §26-2105 "really" meant what the Supreme Court of Georgia was destined to hold it meant more than 17 months after the commission of

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"film. . . dominated by nudity and sex," including intercourse, cunnilingus and masturbation; *Slaton* v. *Paris Adult Theatre I*, 228 Ga. 343, 185 S.E.2d 768, 770 (1971), vacated and remanded, 413 U.S. 49 (1973), affirmed on remand, — Ga. —, — S.E.2d — (October 30, 1973): "simulated sexual activity... conduct of the most salacious character."

[58]It is difficult to determine what were the applicable community standards under §26-2101(b) in January, 1972, when Billy Jenkins exhibited "Carnal Knowledge" in Albany, Georgia. In *Gornto* v. *State*, *supra*, 178 S.E.2d at 896, the Supreme Court of Georgia held that the applicable community standards were "local." However, in *Evans Theatre Corporation* v. *Slaton*, *supra*, 180 S.E.2d at 714, the Supreme Court of Georgia appeared to retreat from the *Gornto* holding by applying both "local" and "national" standards. §26-2101(b) cases are then silent on this issue until well after January, 1972, when two Court of Appeals decisions held that the

the alleged offense. *Shuttlesworth* v. *City of Birmingham, supra* at 156.[59]

It was only on July 2, 1973, when the Supreme Court of Georgia affirmed his conviction, that Appellant knew or could have know that §§26-2105 and 26-2101(b) were to be "construed together,"[60] and that it was permissible to apply §26-2105 in accordance with "local" community standards.

Accordingly, since Appellant's "conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating," *Rabe v. Washington*, 405 U.S. 313, 315 (1972) (per curiam), he was clearly denied due process of law. See also: *Douglas v. Buder, supra* at 432; *Shuttlesworth* v. *City of Birmingham, supra* at 155; *Ashton* v. *Ken-*

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applicable community standards were "national." *Feldschneider* v. *State*, 127 Ga.App. 745, 195 S.E.2d 184 (1972); *Fishman* v. *State*, 128 Ga.App. 505, 197 S.E.2d 467 (1973).

However, none of these §26-2101(b) cases ever applied *statewide* community standards.

[59]Cf. *Miller* v. *California, supra at* 16-18 n. 1 (emphasis added), in which this Court held that *no ex post facto* issue was presented because the law applied was the state obscenity law "as construed by state decisions *prior* to the commission of the alleged offense."

[60]After holding that §§ 26-2105 and 26-2101(b) were to be "construed together," the Supreme Court of Georgia proceeded to affirm Appellant's conviction under "Georgia Statutes" (JA 55; emphasis added). It is thus apparent that Appellant's conviction was affirmed, at least in part, under a statute, §26-2101(b), he was never charged with violating. Accordingly, Appellant was denied due process of law for this reason also. *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948).

tucky, 384 U.S. 195, 198 (1966); *Bouie* v. *City of Columbia*, 378 U.S. 347, 353-355 (1964).

In short, from whatever perspective and at whatever stage the proceedings below are viewed, Appellant was clearly denied due process of law. His conviction must therefore be reversed.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Georgia violates the First and Fourteenth Amendments to the United States Constitution, and therefore must be reversed.

Respectfully submitted,

TENCH C. COXE
WM. H. SCHRODER, JR.
1500 Candler Building
Atlanta, Georgia 30303

LOUIS NIZER
477 Madison Avenue
New York, New York
10022

JAMES BOURAS
522 Fifth Avenue
New York, New York
10036
Attorneys for Appellant

DAVID H. FLINT
J. KIRK QUILLIAN

Troutman, Sanders, Lockerman
& Ashmore

Of Counsel

APPENDIX

[Review of "Carnal Knowledge" by Hollis Alpert, in *Saturday Review*, July 3, 1971, page 18.]

From the time of Jules Feiffer's earliest cartoons in *The Village Voice* his males and females have been engaged in eternal complaint. Strive as they may for enduring and "meaningful" relationships, they never manage to breach the barrier between the sexes. Now the loosely drawn faces of the cartoons have reached a kind of apotheosis in *Carnal Knowledge*, a film written by Feiffer and directed by Mike Nichols for Joseph E. Levine, and the collaboration has resulted in something very special.

For Feiffer, the film probably represents a summing up of his feelings, his attitudes, his knowledge, even his wisdom regarding the mating games played in our society. The view is sardonic, the cartoonist's touch is still in evidence, but there are both precision and reality in the way his people have been captured. For Nichols, his fourth film is his best: it represents direction in the truest sense, which is to say he has achieved clarity without obviousness and has guided his actors to give the performances of their lives. If you thought Jack Nicholson was good before, you will find him superb on this outing. If you thought Ann-Margret was just another glamorized Hollywood sexpot, think again. She is unforgettable.

The structure of the film is daring. The time span encompasses more than twenty years from the late 1940s to the late 1960s. We are never given precise dates, but we are oriented, easily enough, by songs on

the soundtrack, by styles of dress, by subtle changes in decor. True, Jack Nicholson seems a bit weathered as an Amherst undergraduate in a few of the early scenes, but the spirit is accurate and he displays astonishing power as he advances into a lengthly bachelorhood and a brief but disastrous marriage. Candice Bergen is introduced early as a bright girl from Smith; after forty minutes or so she disappears, physically that is, for her presence is felt thereafter. We never see her as an upper-middle-class wife, living and child-raising in the suburbs, but we know her.

However, it is not so much her story as that of two young college men, roommates and lifelong friends forever preoccupied with their sex lives. Both are first met as virgins. Nicholson is the more knowledgeable and attractive of the two; speaking colloquially, he is a burgeoning bastard. Art Garfunkel is his friend, the nice but troubled guy straight out of those early Feiffer cartoons, but *real*. He falls in love with the lovely Susan (Candice Bergen) and unknowingly shares her with his college buddy. As the "safer" one of the two, he is selected by Susan for marriage.

The time changes. Both men are in their thirties, pursuing successful careers in New York. Nicholson has been running through an average of a dozen women a year but has never managed to meet the right one, the one with the full bosom, the good legs, the properly rounded bottom. More than that, each and every one is a threat to his malehood and peace of mind, until at last, in a bar, he finds Ann-Margret, an aging bachelor girl with striking cleavage and, quite obviously, something of a past. "Why don't we shack up?" she sug-

gests. They do and a horrendous relationship ensues, complicated mainly by her paranoidal desire to marry. Meanwhile, what of Garfunkel? The sparks have gone out of his marriage, the sex has lost its savor, and Garfunkel tries once more. And later, even more foolishly, again.

Never do Nichols and Feiffer allow a whiff of sentimentality to cloy their tale. If there is sympathy, it is because the people, through all their betrayals of and double-dealings with each other, somehow manage to remain likable. They are struggling with a bewildering change in mores; they are truly the prisoners of sex. And they remain so into their fatuous middle age. A cruel film perhaps, but an essentially honest one. Not only is the film, overall, the best-acted in years; it is also the most mature of all those American films that have attempted to deal with the subject of sex in these ultra-liberated cinematic times.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies each of this Brief for Appellant, along with three copies each of the Joint Appendix, upon counsel for Appellee, Mr. Carter Goode, Fulton County Courthouse, Atlanta, Georgia 30303, and Mr. Tony H. Hight, Suite 406, 501 Pulliam Street, Atlanta, Georgia 30312, by depositing copies of said Brief for Appellant and Joint Appendix in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery first class.

I hereby certify that all parties required to be served have been served.

This day of January, 1974.

TENCH C. COXE
Attorney for Appellant

TROUTMAN, SANDERS, LOCKERMAN
& ASHMORE
1500 Candler Building
Atlanta, Georgia 30303